LION PROPERTIES SDN BHD

v.

SISPROP SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: B-02-339-1998]
27 OCTOBER 1999

CONTRACT: *Building contract - Developer and landowner - Principal and supplementary agreements - Whether there were collateral agreements - Whether estoppel applied - Whether disputes could be decided based entirely on affidavit evidence*

CIVIL PROCEDURE: *Originating summons - Conversion to writ - Conflicting factual evidence - Whether judge should have decided based entirely on affidavit evidence - Whether judge should have ordered originating summons to be converted into a writ*

The respondent landowner and the appellant developer entered into an agreement dated 29 November 1988 ('the principal agreement') for the sale of a plot of land to the latter. The purchase price was to be settled by way of RM10,000 in cash and the balance through instalments. It was a condition of the principal agreement that the appellant obtained the approval of the relevant authorities to construct its proposed shophouses on the land within nine months from the date of the principal agreement. Subsequently, the parties entered into a supplementary agreement whereby the balance was to be settled by way of the appellant transferring 20% of the total number of shophouses to be constructed to the respondent. Another agreement was later entered into for an extension of the initial nine-month dateline. Thereafter, a second supplementary agreement was entered into for a further extension of the dateline to 15 May 1994.

The appellant contended that as at 15 May 1994, approval had been obtained for one of the two phases of the shophouse project; that before signing the second supplementary agreement, the respondent had assured it that phase two of the project would be allowed to commence within 24 months after the completion of phase one; and that because of the respondent's said assurances, the appellant had given fresh consideration to the respondent in the form of a variation agreement which included *inter alia* RM20,000 in cash and another seven units of the shophouses.

Held:

Per Shaik Daud Ismail JCA

[1] There was evidence that the respondent did give the said assurances to the appellant, and that the appellant was not represented by counsel on the matter.

[2] The respondent was well entitled to terminate the principal agreement by 15 May 1994 but chose not to do so; instead, it allowed the appellant to expend money on the shophouse project and to revive it. The respondent had benefited form this.

[3] In the light of the conflicting and opposing factual evidence, the judge below ought not to have made a decision based entirely on affidavit evidence. The learned judge should have ordered the respondent's originating summons to be converted into a writ so that all the disputes could be resolved at a trial.

[Appellant's appeal allowed; orders of judge below set aside; respondent at liberty to file a fresh writ.]

For the appellant - WM Chang; M/s Raja, Darryl & Loh
For the respondent - Shahul H Amiruddin (George C Proctor with him); M/s YS Woo & Proctor

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-24-443-97]

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

The respondent had filed an originating summons in the Shah Alam High Court seeking various declaratory and consequential reliefs. The facts of the matter are that the respondent with two others owned a piece of land held under G.M. 1680 Lot No. 16359 in the Mukim of Kapar, Klang. The appellant is in the business of developing properties. By an agreement in writing dated 29 November 1988 (the principal agreement) the respondent agreed to sell and the appellant agreed to purchase the above mentioned piece of land for an agreed consideration. The purchase price was to be paid by way of RM10,000 in cash and the balance by instalments to be agreed upon. The appellant was to develop the land in two phases, phase 1 and phase 2. Simultaneously, with the execution of the principal agreement, the parties entered into a supplementary agreement (the supplementary agreement) whereby it was agreed that the balance of the purchase price was to be settled by the appellant

transferring to the respondent and the other two owners of the said land completed units equivalent to twenty percent of the totally completed units constructed on the said land and it was further agreed that each completed unit would fetch a price of RM300,000.

Clause 2 of the principal agreement provides that:

> This Sale and Purchase herein shall be conditional upon the Purchaser obtaining within nine months from date of this Agreement or before the expiry of any extended period as the parties may agree upon, the approval of the relevant authorities to construct a minimum of 100 units 4-storey shophouses cum apartments each of lot size measuring 20 x 80 feet. If the said approval (hereinafter called "the building units") on the said lands is not obtained within nine months from the date of this Agreement or after the expiry of any extended period, then this Agreement shall terminate and the Vendors shall refund to the Purchasers the sum of RM10,000 only paid pursuant to Clause 1 without interest and the Purchasers' solicitors shall return the documents deposited with them pursuant to Clause 3.1 hereof to the Vendors and thereafter neither party shall have any rights against the other.

Consequently, on or about 23 July 1991, the said lands were transferred into the name of the appellant and subsequently were encumbered with a charge in favour of a merchant bank. By an extension agreement dated 1 November 1989, the dateline was extended to 28 August 1992. This dateline lapsed without the approval being obtained from the relevant authorities for the 100 units. Up to this time there appear to be no dispute. The dispute arose in 1994 and they surround the negotiations for a second supplementary agreement for a second extension of the dateline. This second supplementary agreement is dated 12 July 1994 which further extended the dateline to 15 May 1994.

It is the contention of the appellant that as at 15 May 1994, approvals had been obtained for phase 1 but not phase 2 thereof and this had been made known to the respondent but they denied this. It was contended that before the signing of the second supplementary agreement to extend the dateline, the respondent gave assurances to the appellant in respect of phase 2 so as to allow the development of phase 2 to commence within 24 months of the completion of phase 1. That gave rise to the collateral agreement for which fresh and considerable consideration was in fact given by the appellant to the respondent which is contained in another agreement called the variation agreement dated 12 July 1994, the same date as the second supplementary agreement. The variation agreement also extended the dateline for the approval to 15 May 1994.

Under the variation agreement, the appellant made a considerable consideration for the extention *ie*, cash payment of RM20,000 the receipt of which is acknowledged by the respondent, seven units of four-storey shop cum apartments with a market value of RM4.9 million. All these are additional to the principal agreement. Two corner and two end units were substituted for four intermediate units. The question to be asked is why should the appellant fork out so much extra for an extension of the dateline which would be useless unless they relied on the assurances. Therefore, by all these, there is some evidence for the averment that the assurances were in fact given. There is sufficient evidence to show that appellant was not represented by counsel as all documents were sent direct to the appellant and yet the learned judge made a finding of fact that the appellant was represented by counsel.

Although by 15 May 1994, the respondent had every right to terminate the agreements with the appellant, yet they chose not to do so and allowed the appellant to expend money on the project to revive it and thereby the respondent received substantial benefit from it. The appellant raised the issue of estoppel. The respondent contends that estoppel does not apply because of their denial of any knowledge of the lack of approval. The learned judge came to the conclusion that one Ong Kek Send had no personal knowledge of this and yet in the affidavit in reply shown on 16 September 1997 Ong Kek Send averred that the approval had only been obtained for 23 units of industrial shophouses cum apartments in phase 1.

In any case Ong Kek Send's name appear in all the documents with regard to the collateral agreements. The respondent agreed that the person who represented the respondent was one Lim Chong Lai who is in fact Ong's husband. The appellant averred that the person to whom they informed about the lack of approval for phase 2 was Lim Chong Lai. Therefore, there was no basis for the learned judge to conclude that Ong did not have that knowledge.

In the light of so much conflicting and opposing evidence, was it proper for a decision to be made based entirely on affidavit evidence? The very existence of the collateral agreements were severely in dispute. We are, therefore, of the view that in the light of all these conflicting factual evidence, the proper order the learned judge ought to have made was directing the originating summons to be converted into a writ, so that all the disputes can be resolved at a trial. Consequently, we allowed the appeal with costs here and by the court below and set aside all the orders of the learned judge. We gave the respondent the liberty to file a fresh writ and ordered the deposit to be refunded to the appellant.